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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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|------------------------|--|
| Proceeding             | 91188736   |
| Party                  | Defendant<br>Anastasia Marie Laboratories, Inc.  |
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**IN THE MATTER OF TRADEMARK  
APPLICATION SERIAL NO. 77/150,306**

Applicant

[illegible]

Opposition No. 91188736

ABH's brief in opposition to AML's motion does not contest a single one of AML's statement of the facts forming the foundation for the request for dismissal of the opposition. These facts showed (1) that ABH had neither complied with the Board's Order nor responded to AML's simple question as to whether it had the documents called for by the Order and (2) that

throughout this proceeding, ABH has engaged in a continuing pattern of willful deception while stonewalling discovery.

Ever since AML's first discovery requests were served on ABH in October of 2009, AML has been engaged in a futile quest to obtain basic information and documents concerning the extent of sales of products under the ABH Marks on which the opposition is based.<sup>1</sup> Since ABH has neither provided documents which would actually show the extent to which products have been sold under the ABH Marks nor admitted that such documents do not exist, it is evident that ABH does not want the truth about its claims to come out. AML has gradually come to understand that ABH either simply does not have documents which show sales of its own branded products (and therefore has no basis for proceeding) or has been trying to avoid producing such documents (which could show the extent of its fraud) by producing instead documents which show sales of all of the products which it has sold, under its own brands or not.

AML had been misled by statements made by ABH that various documents that it had produced "show" or "reflect" sales of ABH-branded products. In fact, as AML has come to understand, the documents that were produced were records of all products sold, and it is impossible for AML to know whether and to what extent those records consisted entirely of the branded products of others which had been sold by ABH or might have also included some of ABH's own branded products. Thus, the documents that have been produced "show" or "reflect" sales of ABH-branded products or the complete absence thereof only in the sense that the products listed may or may not include ABH-branded products – it is simply impossible to know from the documents themselves.

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<sup>1</sup> AML's own earlier investigations in 2009 had in fact indicated that ABH was not selling products under its own brands - *even in its own salons*.

Nowhere in its brief in opposition to the motion for sanctions does ABH claim that it has ever provided records or information which would actually show the extent of sales of ABH-branded products or equivalent information. It is striking that in its opposition brief ABH avoids making any claim that the documents that have been produced show anything as to ABH-branded products. Instead, ABH continues to play the same deceptive game that it has played from the beginning – pretending that documents which in no way identify ABH-branded products and therefore provide no information about sales of ABH-branded products are somehow responsive while refusing to state whether it has documents which would actually show sales of ABH-branded products.

ABH willfully interpreted the Board's order to require only production of the same useless documents that almost in their entirety had already been produced before the Board's order issued and which provided no information as to the extent of sales of ABH-branded products. ABH does not contest AML's characterization of these documents, and nowhere in its brief does ABH provide any explanation as to why it refused to ever respond to the simple question presented by AML's counsel as to whether it had documents showing sales of products under the ABH Marks (AML Motion for Sanctions, pp. 12-13).

If ABH has such documents, at least for the 2005-2010 period, it is obviously withholding the documents because of what they may show. It is certainly striking that rather than trying to make any argument as to the truth or factual basis of any of its various claims of rights or as to support found in the documents produced, it has resorted to attacking AML based on ABH's own withholding of information and documents, asserting that "if AML claims that it cannot determine the products on which ABH has used its mark, it cannot know whether Ms. Soare's declarations are unreliable, or not" (ABH Opposition Br. p. 10). ABH overlooks the fact

that the Motion for Sanctions was clearly based on the premise that ABH's later revised responses and declarations that narrowed its claims of rights were more likely to be truthful than its earlier broader claims. Thus, simply by comparing ABH's earlier discovery responses and declarations with its later responses, statements, and declarations, AML has been able to determine that ABH had been extremely deceitful concerning its rights.

Nowhere in ABH's brief does it show or even attempt to show that any of the conclusions reached by AML concerning ABH's deception based on ABH's own statements was in error. ABH also makes no attempt whatsoever either to show that any of the responses, statements, and declarations discussed at length in AML's motion for sanctions were truthful or to explain the glaring inconsistencies between them. Instead, ABH's opposition brief itself simply continues its well-established pattern of misdirection and misrepresentation.

#### **ABH's Failure to Comply with the Board's Order**

ABH has argued that it complied with the Board's order because the "[o]rder recognizes that ABH might not have [the] documents in its possession" and because ABH produced "629 pages of documents and electronic records to AML showing the annual sales and revenue earned by the salon" (ABH Opposition Br. p. 5). ABH does not argue, however, that it does not have the documents sought by AML for the period 2005-2010 and certainly does not argue that the documents that it has produced provide the information sought by AML. Finally, ABH also argues, irrelevantly, that AML is not entitled to sanctions because of its failure to pursue other avenues for discovery from ABH (ABH Opposition Br. pp. 6-9)

In its order of January 3, 2012, the Board stated, "AML argues that ABH's supplemental documents supplied with its response to the motion to compel (1) do not provide sufficient explanation about what is shown by the now 'discovered' QuickBooks file report for the period

2000-2004; (2) still do not include sales records for ABH-branded products for the period 2005-2010...and (3) do not show annual income from salon services under the marks”. (Board Order, pp. 5-6). The Board thereupon ordered that ABH provide “the electronic QuickBooks file of sales records for the years 2000-2004, records to show annual sales by item, in round numbers, for the years 2005-2010, and annual sales for the years 2000-2010 from rendering salon services”. (Board Order, p. 7).

As stated above, ABH has carefully avoided making any reference to sales of products under the ABH Marks. ABH has thus asserted that “[i]n compliance with the Board’s Order, ABH produced approximately 629 pages of electronic records of documents to AML including Quickbooks details for Sales by Items from 2000-2004, the gross sales Fishbowl report for 2005-2010, a units sold spreadsheet for 2005-2010, and salon services documents for 2000-2010”. (ABH Opposition Br. p. 4, Statement of Relevant Facts ¶ 9).

The documents produced by ABH for 2000 to 2004 following the Board’s order were simply duplicates of documents that had been already produced, but, as stated in AML’s Motion for Sanctions, AML has now accepted ABH’s representations that it cannot provide records from 2000 to 2004 which could show the extent of sales under ABH Marks (AML Motion for Sanctions, p. 13).<sup>2</sup> Also, following the Board’s Order, ABH finally provided documents showing annual sales for the years 2000-2010 from rendering salon services. However, even the documents provided for 2005-2010 were almost entirely duplicates of what had already been provided and, of course, still provided no information on the extent of sales under the ABH Marks. AML’s Motion for Sanctions was therefore solely directed to ABH’s failure to comply

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<sup>2</sup> The Board also noted that “ABH also states that it does not have, and does not know of a way to generate complete and accurate reports of yearly revenue for sales prior to 2005, but that it would make the electronic file available for forensic analysis”. (Bd. Order, p. 6).

with the Board's order to produce "the records from 2005-2010 of annual sales by item of the products bearing the ABH marks as ordered by the Board". (Motion for Sanctions, p. 13).

As stated in the Motion for Sanctions, "[e]ven though ABH represented to the Board that it had such documents (ABH Brief in Response to Motion to Compel, pp. 9-10), ABH has neither produced the documents ordered nor responded to AML's request for an explanation." (AML Motion for Sanctions, p. 13). Following its largely duplicative production for 2005-2010, ABH simply refused to respond to AML's repeated inquiries as to whether it had documents that would actually show sales of ABH-branded products (Id.). In its brief in opposition to the Motion for Sanctions, ABH does not comment on its refusal to respond to AML's questions and still will not clarify whether it has or does not have documents showing the extent of sales of products under the ABH Marks for this period. That is, ABH remains silent as to whether (1) it has such documents but decided to interpret the Board's order as not requiring their production but as requiring only duplicative production of documents showing sales of all products sold by ABH (whether or not they carry its brand) or (2) simply does not have documents which show the sales of ABH-branded products and therefore has no documentary basis for making its claims.

AML's motion to compel was based on its inability to obtain from ABH any documents which showed the actual extent of sales of products under the ABH Marks. Although AML has been left with no alternative but to accept ABH's representations that it simply did not have records showing sales by item under ABH Marks for 2000-2004 (AML Motion for Sanctions, p. 13), ABH had represented that "[f]rom 2005 to the present, ABH [had], in the regular course of business kept detailed, computerized records of its sales and inventory using Fishbowl software" and had even claimed that it had produced records showing "shipments" of "ABH-branded

products” (ABH Brief in Response to Motion to Compel, p. 9)<sup>3</sup>. AML therefore believed that ABH could produce documents showing the extent of sales of ABH-branded products since 2005.

Certainly, since this is an opposition involving trademark rights, the Board’s order that “[w]ith regard to sales records for 2005-2010, to the extent that ABH has records to show sales by item for the years 2005-2010, those records must be produced, although they may be annual sales in round numbers” (Board Order, p.6) can only reasonably be interpreted as sales under ABH’s claimed marks. ABH had already provided useless sales documents. ABH did not and does not now claim that it had already produced records showing the extent of sales of ABH-branded products and has never stated and does not state now that it has no such records. Instead, ABH simply produced almost entirely the same documents which it had provided before the Board’s order issued and no documents which purported to be or were represented to be documents showing the sales of products under the ABH Marks. Then, ABH simply refused to respond to AML’s repeated requests for clarification (Motion for Sanctions, pp. 12-13).

Finally, ABH’s arguments that there should be no sanctions against it because AML did not follow up on discovery opportunities is irrelevant to the issue and also misleading. The discussions relating to the 2000-2004 records (ABH Opposition Br. pp. 6-7) are meaningless since, as stated above, AML had accepted ABH’s claims that it cannot generate meaningful records for 2000-2004, and these records were in no way the subject of AML’s Motion for Sanctions. The references to 30-40 boxes of invoices, shipping slips, and packing slips that were made available to prior counsel (ABH Opposition Br. pp. 7-8) are likewise meaningless, since, as ABH well knows, these documents do not show whether the products involved are ABH-branded

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<sup>3</sup> Again, however, it appears that the documents “show” shipments of ABH-branded products only in the sense that ABH-branded products are included among the products shipped. It is impossible to know from the documents.



products anymore than the other invoices or sales records that ABH has produced. With respect to its assertion that AML should have taken depositions (ABH Opposition Br. p. 9), ABH pretends that it worthwhile deposition can be taken without any underlying meaningful documents or information. Even after its multiple letters and a motion to compel AML still has essentially only a series of inconsistent declarations and answers as a basis for evaluating whatever claims may be made by Ms. Soare or other potential deponents.

### **ABH's Failure to Defend its False Declarations**

In response to AML's twelve page statement of facts concerning ABH's initial false answers to interrogatories, its false amendments to its false registrations, the false declaration submitted in this proceeding, the false declarations of use, false "confidential statement" prepared by counsel, and evasive and incomplete amended answers to interrogatories, ABH provides a cursory and evasive argument of little more than a page in which it claims that its declarations were not fraudulent (ABH Opposition Br. pp. 9-10). However, ABH makes no attempt to show that any of the declarations was not false. Rather, it bases its argument on the fact that two years ago the Board had found that there were issues of fact that prevented summary judgment on the issue of fraud and on the false proposition that AML takes contradictory positions and "cannot know whether Ms. Soare's declarations are unreliable, or not". Id. p. 10.

First, as recognized by the Board, AML's motion for summary judgment on the issue of fraud involved only the declarations filed in the initial applications. (Bd. Decision of June 30, 2010, p. 12). By contrast, AML's uncontested statement of facts in support of its Motion for Sanctions is primarily directed to ABH's conduct during this litigation. Second, the Board stated that it was denying both ABH's and AML's motions for summary judgment on the issue of fraud

on the grounds that there remained genuine issues of material fact, but it noted that "...ABH's amendment of its registrations to delete the goods on which it admits nonuse, does not vitiate fraud, if any exists". (Bd. Decision of June 30, 2010, p. 14). AML's uncontested statement of facts shows that ABH's pattern of deception and evasions actually continued even in these registration amendments themselves, as well as in the declaration made in support of the amendments and ABH's motion for summary judgment, the declarations of use in the registrations, the "confidential statement" provided by counsel and the amended answers to interrogatories.

Finally, ABH's alleged claims of "flip-flops" and inconsistencies are false. AML's position is clear: while AML has not been provided with documents which show the sales of ABH-branded products, it has been able to discern from ABH's revisions of declarations and answers and its "confidential statement" that, at most, the list of products with which the mark was in use in 2010 was far narrower than claimed in the declarations of use (Motion for Sanctions, p. 10). Contrary to ABH's claim (ABH Opposition Br. p. 10), AML never offered "its own greatly streamlined list of products on which it claims the ABH mark was used". AML cannot take even ABH's latest revisions of claims on faith.

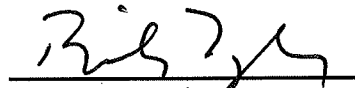
#### **ABH's Pattern of Withholding Discovery**

ABH's final argument is that it did not engage in a pattern of withholding discovery. It relies on factual differences with cases cited by AML (ABH Opposition Br. p. 11), on its making boxes of invoices etc. available, and on the fact that the Board did not grant all of the relief requested by AML in its Motion to Compel (ABH Opposition Br. p. 12). However, apart from the fact that the Board was taking into account the amended answers and thousands of documents provided following the filing of the motion to compel, the uncontested facts remain

that ABH has still not produced any documents which show the extent of sales of ABH-branded and has made only a series of contradictory, deceptive, incomplete and evasive claims as to such sales without showing any basis for the claims. ABH's approach to this proceeding from the beginning has been to make claims of rights either without factual basis or withholding the documents which might show that there is no factual basis. Thus, most recently, ABH not only refused to comply with the Board's order to produce documents showing the annual sales of ABH-branded products for 2005-2010 but also refused even to respond to the simple question of whether it even had such documents. ABH should not only not be permitted to continue making claims of rights without providing a basis for such claims, it should not be permitted to continue at all with an opposition which has been so transparently founded on deception and evasion.

Respectfully Submitted,

**STITES & HARBISON PLLC**

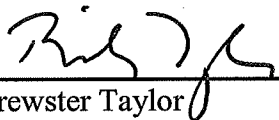


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May 1, 2012

**Certificate of Service**

I hereby certify that true copies of the foregoing BRIEF IN REPLY TO OPPOSITION TO MOTION FOR SANCTIONS was sent via U.S. first class mail on May 1, 2012, to Allan Z. Litovsky, Greenberg Traurig, LLP, 3161 Michelson Drive, Suite 1000, Irvine, CA 92612, and via email to Allan Z. Litovsky at [litovskya@gtlaw.com](mailto:litovskya@gtlaw.com) and to F. Christopher Austin, Greenberg Traurig, LLP by e-mail at [austinc@gtlaw.com](mailto:austinc@gtlaw.com) .

  
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